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Recommended Citation

Brief of Appellant, *State v. Danker*, No. 16200 (Utah Supreme Court, 1979).
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MAN

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff and	:	
Respondent.	:	
	:	
vs.	:	Case No. 16200
	:	
GLORIA DANKER,	:	
	:	
Defendant and	:	
Appellant.	:	

APPELLANT'S BRIEF

* * * * *

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT FOR UTAH COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE

* * * * *

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STATEMENT OF THE KIND OF CASE

This is a criminal action against the Defendant under §76-8-508 Utah Code Annotated 1953 as amended in which Defendant was charged with having attempted to influence the testimony of her minor child as said testimony to a separate action.

DISPOSITION IN LOWER COURT

The case was tried in a jury. From a verdict and judgment of guilty, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Judgment, a setting aside of the sentence imposed and a judgment of not guilty as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

This action arose out of an incident which occurred in the early morning hours of August 6, 1978. Two officers of the Vernal City Police Department were dispatched to the Defendant's residence. When they arrived there the Defendant indicated to them that her seven year old daughter Rayna may

have been sexually assaulted by one Kenneth D'Anza. Based upon the information given them by Defendant, the officers placed D'Anza under arrest and one of them transported him to the Uintah County Jail. Following D'Anza's arrest, Defendant and her two daughters were transported to the Uintah County Hospital in order that the daughter Rayna could be examined by a doctor. During the examination and throughout the rest of the day of August 6, 1978, the Defendant told her daughter Rayna to answer all of the questions the police asked.

On August 7, the following day, Defendant called the Vernal City Police Department and left a message for Detective Downard to the effect that the Defendant intended to send her children to New York to be with their father. There followed a series of events which culminated in Defendant's children being taken from her custody and placed in temporary shelter care under the direction of the Division of Family Services.

Upon being informed that her children were to be removed from her, Defendant became very emotional and began to tell Rayna not to cooperate any further with the police. The admonition by the Defendant to her daughter was repeated several times until the daughter was removed from Defendant's custody on the afternoon of August 7, 1978.

As a result of Defendant's admonitions to her daughter Rayna, Defendant was charged with having violated §76-8-508 Utah Code Annotated 1953 as amended. At the trial in the Fourth Judicial District Court for Uintah County, the Court allowed the State to illicit specific testimony relative to the charges then pending against Kenneth D'Anza in spite of the timely objection by Defense counsel that such evidence was irrelevant. At the consulsion of the trial the issue was given to the jury which returned a verdict of guilty. From said verdict Defendant appeals.

ARGUMENT

THE TRIAL COURT ERRED IN OVER RULING DEFENDANT'S OBJECTION TO THE INTRODUCTION OF SPECIFIC TESTIMONY RELATIVE TO THE CRIME WITH WHICH KENNETH D'ANZA WAS CHARGED.

As was indicated in the statement of facts above, the acts for which Defendant was prosecuted grew out of and are the unfortunate results of the circumstances surrounding the alleged sexual abuse of Defendant's seven year old daughter by one Kenneth D'Anza. It was incumbent upon the State's attorney at the trial herein to prove beyond a reasonable doubt the facts alleged by the State. As part of said proof it was the right and duty of the State to set out for the

trier of fact the chain of events leading up to the alleged criminal act. In the majority of cases the presentation of all foundational facts which are probative of the issue being tried poses very little, if any, ground for objection. Under certain circumstances, however, the relevance and probative value of various kinds of testimony and/or physical evidence must be balanced against the prejudicial effect which such evidence may have upon the feelings, and thus the decisions, of the trier of fact; especially when the trier of fact is a jury of lay people not trained in legal principals.

Such is the situation in the instant case. Few crimes have the potential of arousing feelings of passion and disgust in people that is associated with the sexual abuse of small children. To the normal adult such actions are unjustifiable by any set of circumstances. If one who commits such acts is held in disregard, however, those individuals who seem to defend or excuse such conduct and its perpetrators are felt to be nearly as disreputable. In allowing the State to present specific and verbally graphic testimony about the alleged act of forceable sodomy, which led to Defendants actions, and then linking such testimony to Defendant's alleged efforts to prevent her daughter from cooperating with the police in their investigation of that allegation, the Trial Court allowed

testimony to be admitted, the probative value and relevance of which was far out weighed by its potential to cause the jury to be unfairly prejudiced against Defendant.

The leading Utah case dealing with prejudicial evidence is that of State v. Poe, 21 Utah 2d 113 (1968). Therein the defendant was convicted of first degree murder. Part of the evidence consisted of a series of color slides which showed the victim's body during various stages of the autopsy. The slides were very gruesome in detail. Also introduced as evidence was a series of black and white photographs which showed the victim lying in bed with two bullet holes in his head. In reversing and remanding the case the Court reasoned as follows:

Initially, it is within the sound discretion of the trial court to determine whether the inflammatory nature of such slides is outweighed by their probative value with respect to a fact in issue. If the latter they may be admitted even though gruesome. In the instant case they had no probative value. All the material facts which could conceivably have been adduced from a viewing of the slides had been established by uncontradicted lay and medical testimony. The only purpose served was to inflame and arouse the jury.

This same test of probative value weighed against inflammatory and prejudicial effect was applied in State v. Renzo, 21 Utah 2d 205 (1968). Therein the Court was

again faced with gruesome color pictures of a murder victim's body. Unlike the pictures in State v. Poe, supra, which added nothing to the evidence already before the Court, the pictures in Renzo made up a vital portion of the State's case in that they evidenced an element of the crime in a manner not possible with other available evidence. The Court in Renzo again indicated that evidence is not excludable simply because of its gruesome nature:

While the pictures admitted in evidence might be improper to show outside of the courtroom, they afforded mute evidence of the depravity of the one who killed the victim. This evidence was material and relevant. It was not incompetent because it might be gruesome, and practically every State in the Union has so held. A sampling of cases from the various states is listed below.

The Court then went on to cite several cases from other jurisdictions which applied the same basic rule.

In the case of Oxendine v. State, 335 P.2d 940 (1958), which was cited as a footnote in Poe v State, supra, the Oklahoma Criminal Court of Appeals held that the admission of gruesome photographs was reversible, prejudicial error on the grounds that the photographs had no probative value in establishing any issue in the case, but were a mere appeal to the emotions and passion of the jury.

In State v. Amundsen, 223 P.2d 1067 (1950), the Washington

Supreme Court delt with the admission of oral testimony which was similar in nature to the testimony objected to herein. The Defendant had been charged with indecent assault. The State's attorney attempted to illicit testimony concerning an admission by the Defendant of lewd and lascivious conduct constituting another crime of which there was no showing that the Defendant had been convicted. On two occasions the State asked questions concerning the alleged conduct but complete answers to those questions were not allowed by the Court. In determining that even the amount of testimony which got into the record constituted prejudicial error, the Court cited State v. McVeigh, 214 P.2d 165 (Wash.) and State v. Goebel, 218 P.2d 300 (Wash.) as follows:

"This Court has held many times that a Defendant must be tried for the offense charged in the information, and that to introduce evidence of prior acts of misconduct which have not resulted in a conviction by a court of law is grossly and erroneously prejudicial."

In the instant case, Defendant Danker is not objecting to evidence of any former acts of her own, but the testimony concerning the alleged acts of Mr. D'Anza had the same effect as did the objectionable testimony in Amundsen. Defendant Danker was painted as a person who defended a man accused of

abusing her own daughter. The testimony concerning D'Anza's actions had no value other than to inflame the jury.

CONCLUSION

In three of the cases cited above, State v. Poe, State v. Renzo and Oxendine v. State, the Courts dealt with the admissibility of gruesome photographs of murder victims. The rule in deciding whether the admission of such evidence was erroneous was declared to be whether the probative value of the evidence outweighed the inflammatory and prejudicial effects which it may have upon the jury. If such evidence was deemed necessary in order for the State to prove the elements of its case, the evidence was properly admissible. If, however, the gruesome evidence added nothing of value to the State's case but was designed only to inflame jury passions, the admission of such evidence was prejudicial error.

In the instant case the evidence objected to is not gruesome physical evidence, but rather is oral testimony of an equally gruesome and inflammatory nature. Over the objection of Defense counsel, the State's witnesses were allowed to refer repeatedly to the charge of foreseeable

sodamy and at one point a police officer was allowed to quote D'Anza's alleged victim to the effect that D'Anza had stuck his pee-pee in her bum hole and his finger in her pee-pee, see p.19, 26-28 of the trial manuscript. In State v. Poe, supra, the improper evidence at least dealt with the crime before the Court. In the instant case the testimony as to D'Anza's alleged act had no relation to the offense for which Defendant was being tried except as foundational evidence, and as such its probative value was less than de minimis when balanced against the terrible potential it had for causing the jury to be unduly prejudiced. As a result of the objectionable testimony being admitted, it is possible that Mrs. Danker was tried as D'Anza's accessory rather than on the merits of the case before the Court.

Because of the great prejudicial impact of the testimony relative to D'Anza's alleged crime (of which he was found not guilty) when balanced against its slim probative value, and because said testimony is similar to that testimony found to be improper by its very nature in State v. Amundsen, supra, Defendant-Appellant Danker respectfully requests the Honorable Court to reverse the trial Court's verdict and judgment as prayed for above.

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